NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 17 2008

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DUSTIN ROBERT COSTA, aka Reverend D.C. Greenhouse, Defendant - Appellant.	No. 07-10092 D.C. No. CR-05-00281-AWI MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted December 3, 2007
San Francisco, California

Before: FARRIS, BEEZER, and THOMAS, Circuit Judges.

Dustin Robert Costa appeals his conviction and sentence for violations of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 18 U.S.C. § 924(c)(1)(A). On February 19, 2004, a search of Costa's residence yielded 908 marijuana plants and 8.8 pounds of

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

processed marijuana. Police seized bags of crushed marijuana, a metal strainer, a scale, scissors, a calculator, plastic baggies, and latex gloves. In a room next to the drug processing area, the police found a loaded shotgun and several rounds of ammunition. A jury found Costa guilty and the district court sentenced him to 180 months in prison.

Costa raises several arguments on appeal: 1) the search warrants lacked probable cause; 2) the district court improperly excluded testimony under Federal Rule of Evidence 403; 3) the evidence was insufficient to convict Costa under 18 U.S.C. § 924(c)(1)(A); 4) the district court erred by enhancing his sentence pursuant to 21 U.S.C. § 841; 5) the district court erred by not providing Costa "safety valve" relief; and 6) Costa's sentence violates the Eighth Amendment. We address and deny each argument.

The totality of circumstances coupled with the anonymous tip justify that probable cause existed for the warrants to issue. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983) (reviewing the totality of the circumstances). A trier of fact could find that the affidavits for the search warrants were knowingly embellished, but in spite of this, there was probable cause for the warrants to issue. *See United States v. Senchenko*, 133 F.3d 1153, 1158 (9th Cir. 1998). We review the issuance of a search warrant by a magistrate judge for clear error. *See United States v.*

Fernandez, 388 F.3d 1199, 1252 (9th Cir. 2004) (quoting *United States v. Celestine*, 324 F.3d 1095, 1100 (9th Cir. 2003)). On the record, the tip that Costa possibly had an indoor marijuana grow operation came from an anonymous citizen, not a confidential informant. Further, the electrical usage data was not obtained by comparing electrical bills of neighbors, but from conversations with neighbors regarding their electrical use. However, the thermal imaging data was accurate and properly obtained. Even after setting the affidavits' false material to one side, the remaining content was sufficient to establish probable cause.[1] *See id.* The fact that

[1] Contrary to the dissent's assertion, the facts of this case are distinguishable from *United States v. Clark*, 31 F.3d 831 (9th Cir. 1994). In *Clark*, probable cause was missing where the affidavit in support of the warrant contained only three relevant pieces of information: (1) an anonymous tip that the defendant, a resident of Alaska, was a close acquaintance of a man wanted by police in Missouri for marijuana related offense; (2) the defendant used high levels of electricity inconsistent with heating his home; and (3) the defendant had surrendered a Missouri drivers' license and obtained an Alaska license. *Id.* at 832. Here, however, the affidavit contained legally sufficient information. Unlike in *Clark*, the anonymous tipster indicated that Costa was possibly growing marijuana at the Mercedes residence. The tip had substantially more weight than the one in *Clark*, since it indicated Costa was growing marijuana, not just that he had an acquaintance who previously did. The second warrant affidavit also stated that the residence showed high electrical usage, had an outbuilding, a cargo container, and two exhaust fans that were purposely obscured from view. These elements were consistent with marijuana cultivation. The third warrant added the thermal imaging data, which further corroborated the possibility of marijuana cultivation. Even without evidence of Costa's prior criminal history, the totality of the circumstances suggest marijuana cultivation at a specific location, supporting the finding of probable cause. *See United States v. Luong*, 470 F.3d 898, 902 (9th Cir.

(continued...)

Costa did not reside at the Winton address was significant, but not enough to defeat probable cause. On this record we lack a "definite and firm conviction that a mistake has been made." *United States v. Maldonado*, 215 F.3d 1046, 1050 (9th Cir. 2000) (quoting *United States v. Palafox-Mazon*, 198 F.3d 1182, 1186 (9th Cir. 2000)). We need not reach the "good faith" issue. *See United States v. Leon*, 468 U.S. 897, 923 (1984).

Costa contends that the district court improperly excluded witness testimony. However, the court permitted Costa to develop his arguments for legal and personal use of marijuana, which the jury could have considered in relation to the third charge. The district court did not abuse its discretion. *See United States v. Sure Chief*, 438 F.3d 920, 925 (9th Cir. 2006).

There was sufficient evidence to find possession of a firearm in furtherance of a drug crime. *See United States v. Krouse*, 370 F.3d 965, 968 (9th Cir. 2004).

Costa's prior conviction for cultivation of marijuana, which resulted in a deferred sentence, qualifies as a prior offense and supports the district court's

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[1](...continued)
2006). This is not a repeat of *Clark*, where high energy usage was merely coupled with an ambiguous tip about the defendant's close acquaintance who was wanted for marijuana crimes, and where the tip said nothing about the defendant's possible, current drug activities. *See Clark*, 31 F.3d at 832-3.

enhancement under 21 U.S.C. § 841. *See United States v. Norbury*, 492 F.3d 1012, 1014 (9th Cir. 2007).

It was not error to deny Costa "safety valve" relief. *See* U.S. Sentencing Guidelines Manual § 5C1.2. Costa failed to prove by a preponderance of the evidence that he possessed the shotgun for innocent purposes unrelated to his drug activities. The district court did not commit clear error. *See United States v. Bynum*, 327 F.3d 986, 993 (9th Cir. 2003).

We review the constitutionality of a sentence de novo. *United States v. Leon H.*, 365 F.3d 750, 752 (9th Cir. 2004). Costa was sentenced to the mandatory minimum. There was no Eighth Amendment violation. *See United States v. Parker*, 241 F.3d 1114, 1117 (9th Cir. 2001).

AFFIRMED.